In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-654

BENNER GLASS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On April 6, 1973, a Board-conducted representation election was held among the Company's production and maintenance employees, which resulted in 26 votes for the Union,[1] 21 votes against it, and 2 challenged ballots. The Company filed timely objec-

[1] Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO.

tions to the election, contending that the Union had engaged in threatening and coercive conduct and had made an improper offer to waive initiation fees. The Regional Director overruled the objections. (Pet. A9.) The Board upheld the Regional Director on the waiver-of-initiation-fees issue, but ordered a hearing on the alleged threats (Pet. A9-A10). Following the hearing, the Board's hearing officer recommended that the remaining objections be overruled (Pet. A10).

In the interim, the Company filed a motion for reconsideration of the waiver-of-initiation-fees issue in light of *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270. On March 7, 1974, the Board issued a Supplemental Decision and Certification of Representative in which it adopted the hearing officer's recommendations, denied the Company's motion for reconsideration, and certified the Union as the employees' representative. (Pet. A10.)

The Company refused to bargain with the Union. The Board found that the Company's refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1), and it issued a bargaining order (Pet. A7-A17). The court of appeals enforced the order (Pet. A1-A5), and subsequently denied the Company's petition for rehearing (Pet. A6).

2. The petition challenges only the Board's finding that the Union's offer to waive initiation fees was proper. That offer, contained in a leaflet distributed the day before the election, read as follows (Pet. 4):

> Your dues will be $8.00 per month with no initiation fee. No dues will be paid until we have a contract signed by the Company and agreed to by you, the workers.

The Company contends that this offer was illegal under *National Labor Relations Board* v. *Savair Manufacturing Co., supra,* and *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405.

a. In *Savair*, the Court ruled that "permitting the union to offer to waive an initiation fee for those employees signing * * * [up] prior to the election * * * allows the union to buy endorsements and paint a false portrait of employee support * * *" (414 U.S. at 277). The Court recognized, however, that a union has a "legitimate" interest in waiving its usual initiation fee where such waivers are "available not only to those who have signed up with the union before an election but also to those who join after the election." *Id.* at 274, n. 4. Thus, the proscription of *Savair* is against obtaining preelection demonstrations of union support, which could create a bandwagon effect, by the offer of an economic benefit limited to the preelection period.

The Union's offer in this case, made the day before the election, was not an attempt "to buy endorsements and paint a false portrait of employee support." The meaning of the leaflet was that, regardless of when the employees joined the Union, there would be no initiation fee, and dues would not be paid until a contract was signed and agreed to by

the employees.[2] There was therefore no "conduct immediately favorable to employees which [was] undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and [was] reasonably calculated to have that effect." *National Labor Relations Board* v. *Exchange Parts Co., supra*, 375 U.S. at 409.

b. The decision below is fully consistent with other judicial decisions since *Savair*. In every case where no impropriety was found, the offer by the union, like that here, informed the employees that the waiver would apply to all. See *National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (C.A. 8), certiorari denied, No. 74-1381, October 6, 1975; *Altman Camera Co., Inc.* v. *National Labor Relations Board*, 511 F.2d 319, 322 (C.A. 7); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (C.A. 6); *National Labor Relations Board* v. *Con-Pac, Inc.*, 509 F.2d 270, 272-273 (C.A. 5); *Thrift Drug* v. *National Labor Relations Board*, 90 LRRM 2802 (C.A. 5); *National Labor Relations Board* v. *Dunkirk Motor Inn*, 90 LRRM 2961, 2962 (C.A. 2). Cf. *National Labor Relations Board* v.

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[2] The Company contends (Pet. 10) that the Board erroneously denied a hearing to determine the meaning of the leaflet. The Company offered no evidence, however, that the Union applied the waiver in a manner at variance with the language of its leaflet. See *National Labor Relations Board* v. *White Knight Mfg. Co.*, 474 F.2d 1064, 1068 (C.A. 5); *National Labor Relations Board* v. *O.K. Van Storage, Inc.*, 297 F.2d 74, 75 (C.A. 5).

Stone & Thomas, 502 F.2d 957, 958 (C.A. 4); *Fort Smith Outerwear, Inc.* v. *National Labor Relations Board*, 499 F.2d 223, 226 (C.A. 8). Moreover, contrary to the Company's contention (Pet. 12), there is a clear difference between a pre-election offer to waive fees for "charter" members (the word "charter" being left undefined) and an unrestricted statement that there will be no initiation fee; for "charter" members could well be thought to be those joining prior to the election. See *Regency Electronics, Inc.* v. *National Labor Relations Board*, 523 F.2d 522, 525-526 (C.A. 7); *Inland Shoe Mfg. Co.*, 211 NLRB No. 73, 86 LRRM 1498, 1500; *Coleman Co.*, 212 NLRB No. 129, 87 LRRM 1004, 1005; *California State Automobile Association*, 214 NLRB No. 27, 87 LRRM 1305.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
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DECEMBER 1975.

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